IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO. 1993 of 2005

IN

FIRST APPEAL NO. 215 of 1997

Agnel Anthony Lobo .. Applicant

V/s

1a) Mrs.Maria Idatin Fernandes

and Ors. ... Respondents

Mr.G.R.Rege with Mr.Kapil N.Gor and Mrs.Leena Chavan for applicant

Mrs M.S.Bhatia for Respondent

CORAM:S.R.SATHE,J.

DATED:21st Feb. 2006

P.C.:-

1. The applicant original Appellant in First Appeal No.215 of 1997 has filed this application for recalling the order passed by the Court (Coram:A.M. Khanwilkar,J.) on 8-2-2002 whereby the applicant was directed to remove the office objection within a period of 8 weeks and it was further directed that failing which the appeal to stand dismissed for non prosecution without further reference to the Court.

The applicant has stated that in pursuance of the said order appeal was dismissed. He has therefore prayed that the appeal be restored and be disposed of on merits.

2. Brief facts giving rise to this application are as under :-

. A decree for eviction of the suit premises was passed against applicant original defendant on 30-9-1996 by the City Civil Court Judge, Mumbai. Being aggrieved by the same the applicant original plaintiff filed First Appeal No.215 of 1997. He also filed an application for stay to the execution of the decree. This Court (Coram:S.Radhakrishnan J) was pleased to stay the execution on condition that the applicant defendant shall pay a sum of Rs.3,000/- per month as compensation directly to the Respondents for conducting the business in the said premises and shall also deposit Rs.3,00,000/- within a period of 16 weeks. The applicant could not comply the said order. He therefore sought modification in the same. On 18-7-2000 this court (Coram:Dr.D.Y.Chandrachud J) passed order directing the applicant to pay amount of Rs.3,00,000/- mentioned in the order dated 9-12-1997 on or before 1-2-2000 and to pay arrears of compensation within a period of 4 weeks. It was also made clear that in the event of failure to pay the amount accordingly the order of stay shall stand

vacated without further reference to the court. 3. Admittedly the order passed by this Court on 2-8-2000 was not complied by the applicant. Thereafter by virtue of the order dated 8-2-2002 the matter was dismissed as a result of non compliance of the order dated 8-2-2002 i.e. non removal of the office objection regarding filing of the paper book etc. It is the case of the applicant that his Advocate who filed the First appeal stopped the practice and attending the High Court regularly. He did not inform the applicant about the position of the first appeal or the order passed by the Court on 8-2-2002. However few days prior to the filing of the present application which is filed on 17-3-2005, he came to know about the dismissal of the appeal and hence he immediately filed the present application. It is the case of the applicant that there was no fault on his part in non complying the order dated 8-2-2002 because his Advocate had not at all informed him about the said order. So, according to him there is justifiable ground for restoration of the matter.

3. The application is strongly opposed by the Respondent. Respondent no.2 has filed affidavit and contended that averments in the application are false. Applicant’s Advocate Shri Mehta is practising even now in the High Court. Moreover, the averments made by the applicant that he came to know about the dismissal of the appeal few days prior to filing of the

application is not correct because the Respondents had filed execution proceedings in the trial Court and notice under Order 21 Rule 22 of Code of Civil Procedure was issued to the present applicant's Advocate and he had even filed reply to the said notice. However, the applicant suppressed all these material facts and falsely stated that he had no knowledge about the conditional order passed on 8-2-2002. The Respondent therefore prayed for dismissal of the application.

4. I have heard both the learned Advocates. At the outset it must be mentioned that learned Advocate for the Respondents submitted that Respondents have in fact taken possession of the suit property in execution proceedings. The learned Advocate for the applicant original defendant also conceded to this position. When such is the position there is in fact no propriety now after so many years to restore the appeal. However, the fact remains that if at all applicant succeeds in the appeal then he may seek remedy of restoration. However, for that he has to establish that he had no knowledge about the order dated 8-2-2002 for long time and he came to know about the same few days prior to the filing of the present application. He has to explain the delay of 2 years and 269 days which has occurred in filing the Civil Application for restoration of the first appeal.

5. Firstly, it must be noted that though the applicant has stated in his application that his Advocate Shri Mehta had not informed him about the dismissal of the appeal, he has not filed affidavit of his Advocate in this regard. So, it is vague allegation made by the applicant. There is nothing to substantiate the same. As against this the Respondents have filed affidavit stating specifically that even now the learned Advocate for the applicant is attending the High Court. This submission of the Respondent is not controverted by filing rejoinder. So, it is difficult to believe that the applicant had not received communication from his Advocate regarding the order passed on 8-2-2002.

6. The Respondent has also stated on affidavit that in execution proceedings notice under Section 21 Rule 22 of Code of Civil Procedure was issued to the applicant and he had given reply to the same on 8-8-2004. So, under such circumstances it is very clear that submission made by the applicant that he came to know about the dismissal of the appeal few days prior to filing of the present application is in that totally false. So, under such circumstances there is no reason to condone the delay and to restore the appeal.

7. Considering the fact that the Respondent original plaintiff has already taken possession of the suit

premises in execution proceedings and they have not received the amount of the compensation from the applicant it was suggested to the Respondents' Advocate as to whether respondent is having any objection if the first appeal is restored on condition that the applicant original defendant shall deposit the amounts as per order passed by this Hon'ble court on 18-7-2000. The learned Advocate for the Respondent submitted that if the applicant deposits the entire amount then only matter may be restored. However, according to her there is in fact no justifiable reason to restore the matter.

8. Shri Rege, learned Advocate for the applicant submitted that today the applicant is not asking for restoration of the possession but he is only asking for restoration of the appeal and under such circumstances there is no need to pass order regarding deposit of the amount. To substantiate this proposition he has placed reliance on a case Bata India Ltd. V/s Sunilkumar Shamsundar Chaudhari - **2004(3) Mh.L.J. 702**. That was a case where in writ petition the learned Single Judge of this Court had stayed the execution of the decree on a condition of Petitioner depositing certain amount. The petitioner failed to deposit the amount accordingly, so Respondent moved an application for vacating the stay. While disposing of the said application the learned single Judge dismissed the entire writ petition. When

this order was challenged in LPA the Division bench of this Court held that the order regarding dismissal of the entire writ petition is not justifiable and therefore quashed the said order. It is needless to say that facts of the said case and the facts of the case in hand are quite different. In that case the application was only for vacating the stay for non compliance of earlier order. Here it is not so. The appeal itself has been dismissed for default for non compliance of the particular condition. So, if at all the said appeal is to be restored then certainly the Court has got every discretion to put conditions. While putting such conditions the Court has to take into consideration all the facts and circumstances of the case.

9. Firstly, it has to be mentioned that the in the present case after filing the appeal, on the basis of the order granting stay the applicant has remained in possession of the suit premises right from 1997 till 2006. So, if now the appeal is restored and no order with regard to deposit of amount is passed then it would amount to allowing the applicant to abuse the process of law. During all these years the Respondent original plaintiffs have been deprived of not only the suit premises but also of the compensation amount. So, under such circumstances if opportunity is to be given to the applicant to have the decision of the first appeal on merits then he has to deposit the

amount as per earlier order because he has all along enjoyed the fruits of the said order. Under such circumstances, I have absolutely no hesitation to hold that this is not a case where first appeal can be restored simply on payment of some costs, the applicant has to be directed to deposit the amount as per earlier order and then only seek decision of the first appeal on merits.

10. Hence I pass the following order :-

i) The order regarding the dismissal of the first appeal is set aside and the first appeal is restored subject to the applicant complying the following conditions :

ii) The applicant to comply the order dated 18-7-2000 in C.A.No.4685 of 2000 and also to pay the compensation at the rate of Rs.3,000/- per month upto date of handing over the possession of the suit premises;

iii) Out of the said total amount 1/4th amount be deposited by the applicant in this Court within 1 month rom today;

iv) Next 1/4th of the said amount of total dues to be deposited within a period of 3 months from today;

v) Remaining balance i.e. half of the total dues to be deposited within a period of 6 months from today;

vi) If the applicant deposits the amount as mentioned above then only first appeal is to be restored;

vii) The applicant to pay costs of Rs.5,000/- of this application to the Respondent within 8 days from today.

viii) If the amount is deposited accordingly by the applicant the Respondent may move the Court for withdrawal of the same.

Civil Application disposed of accordingly.

(S.R.SATHE,J.)